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No. 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

WILLIAM L. MAXWELL, PETITIONER,

v.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,
RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF BERL I. BERNHARD, WILLIAM COLEMAN, SAMUEL DASH, JOHN W. DOUGLAS, STEVEN DUKE, WILLIAM T. GOSSETT, JOHN GRIFFITHS, RITA HAUSER, GEORGE N. LINDSAY, BURKE MARSHALL, MONRAD S. PAULSEN, STEVEN R. RIVKIN, WHITNEY NORTH SEYMOUR, JEROME J. SHESTACK, CYRUS R. VANCE, and JAMES VORENBERG, URGING REVERSAL

BERL I. BERNHARD
1660 "L" Street, N.W.
Washington, D.C. 20036

WILLIAM T. COLEMAN, JR.
2635 Fidelity Philadelphia Trust Building
Philadelphia, Pennsylvania 19109

SAMUEL DASH
Georgetown Law Center
Washington, D.C. 20007

JOHN W. DOUGLAS
888 - 16th Street, N.W.
Washington, D.C. 20006

STEVEN DUKE
Yale Law School
New Haven, Connecticut 06520

WILLIAM T. GOSSETT
Penobscot Building
Detroit, Michigan 48226

JOHN GRIFFITHS
Yale Law School
New Haven, Connecticut 06520

CYRUS R. VANCE
120 Broadway
New York, New York 10005

MRS. RITA HAUSER
110 East 42nd Street
New York, New York 10017

GEORGE N. LINDSAY
320 Park Avenue
New York, New York 10022

BURKE MARSHALL
Armonk, New York 10504

MONRAD S. PAULSEN
University of Virginia Law School
Charlottesville, Virginia 22904

STEVEN R. RIVKIN
918 - 16th Street, N.W.
Washington, D.C. 20006

WHITNEY NORTH SEYMOUR
120 Broadway
New York, New York 10005

JEROME J. SHESTACK
1719 Packard Building
Philadelphia, Pennsylvania 19102

JAMES VORENBERG
Harvard University Law School
Cambridge, Massachusetts 02140

Washington, D.C. THIEL PRESS 202 393-0625

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INTEREST OF AMICI CURIAE[1]

The *amici curiae* join to tender Argument to the Court on an aspect of this case which reflects the most funda-

[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of the parties to the filing of this Brief Amici Curiae.

mental dimensions of their individual professional responsibilities as members of the Bar.

The first motivation prompting this brief is a professional concern to preserve and develop the standards of fairness in the administration of justice standing at the heart of our constitutional structure. Each of the signers of this brief is familiar with the problems of criminal law enforcement and with the practical requirement that the American system of criminal justice function with substantial fairness to all accused of crime.

In addition, each of the signers of this brief has pledged his professional skills to the fulfillment for all Americans of civil rights under law. Since the context in which this case rises to Constitutional proportions is shaped by the factor of race, the signers consider Argument with respect to the bearing of this factor essential to the full and proper development of the questions fairly comprised in this case.

Because considerations of procedural fairness and racial justice come together in the constitutional issues here on review, the undersigned hereby respectfully tender this brief *amici curiae*.

ARGUMENT

I.

WITHOUT APPROPRIATE STANDARDS, THE ARKANSAS SINGLE-VERDICT PROCEDURE IS SUSCEPTIBLE TO RACIALLY MOTIVATED DECISIONS ON THE IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE CONSTITUTION'S DUE PROCESS AND EQUAL PROTECTION GUARANTEES.

Standards to guide juries in selecting convicted persons for capital punishment are essential to comply with the Due Process requirement that discretion be limited and that the criminal process include structural guarantees against decisions based on passion and prejudice, as well as the Equal Protection requirement that the State not invite racially motivated decisions. Appropriate standards can be devised by any State which wishes to delegate to juries the power to impose the death sentence.

A.

The death penalty for a "capital" offense has become the exception, rather than the rule, and this accentuates the need for standards to determine the occasions on which it is to be inflicted if administration of the death penalty is to meet Due Process requirements. The current rarity of the death penalty also destroys the support of tradition for the Arkansas practice.

Only a small fraction of persons convicted of offenses for which death is a possible penalty actually receive the death sentence, in Arkansas or anywhere else (see Petitioner's Appendix B, at 24a-34a). It is now unthinkable that any significant proportion of "capital" offenders could be put to death. Thus the definitions of so-called

"capital offenses" no longer reveal anything about the criteria by which the death sentence may be imposed. In capital cases, the absence of any relationship between the elements of the offense and the punishment imposed makes compelling the need for explicit standards to guide the jury. The sentencing jury in a capital case is empowered to select for a special and awesome penalty a very few victims from among the total pool of convicted persons. It should hardly require argument that the power to make such a selection cannot be delegated without any standards at all in a constitutional system which will not allow delegation of the power to impose court costs on an acquitted defendant as on a mere finding that he was guilty of "some misconduct" which "has given rise to the prosecution." *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). Due process of law is denied in the most fundamental way when a decision to forfeit life is made on the basis of *no legal rule at all*.

Earlier in our history, when the death sentence was a normal adjunct to a conviction, the definition of a capital crime generally provided some guidance for the occasions on which capital punishment would be inflicted, and made plausible the proposition that a jury might lawfully be left with unguided discretion to dispense mercy. There is unquestionably a great difference between discretion to reprieve and discretion to take a life. Ultimately, whether a situation involves the one or the other is a question of fact. The fact is that capital sentencing in 1969 consists of the selection of victims, not the selection of persons to be spared.

When a death sentence is no longer a serious possibility for the vast majority who commit the proscribed

offense, it becomes a fiction to pretend that the commission of the offense itself is the cause of the sentence. The offense has become an excuse to execute a man for other unrelated or virtually unrelated reasons. Perhaps such a system is permissible *but only if these collateral reasons are clearly prescribed.* Arkansas' juror, delegated the power to make society's most awesome choice, is given no criteria upon which to make it. He is left to his prejudices and his subconscious for the keys to decision. Often, as Petitioner's statistics at least strongly suggest, the juror is moved by his fear of difference and decides to impose the death penalty upon the defendant because of his race.

The disappearance of the death penalty as a normal consequence of conviction for even the most heinous offenses has not only enlarged the operational content of jury "discretion", and created the necessity for standards, it has eliminated tradition as a ground for perpetuating the Arkansas practice. The issue now before the Court is vastly different from what it might have been even a few decades ago, though it remains clothed in the same conceptual garments.

B.

The Arkansas procedure is tantamount to an instruction that race may be taken into account and is thus a deprivation of Equal Protection of the Laws.

If an Arkansas court, or any other court, were to charge a sentencing jury that it could consider race in deciding defendant's fate, a sentence imposed by such a jury would be void with no proof whatever that the jury

had actually been racially motivated in fixing the sentence (see Petition for Certiorari, pp. 45–47). The same Constitutional rule is *a fortiori* where the sentence is death. Our system of jury trials rests on the assumption that juries are guided and influenced by what they are and are not told by the presiding judge. Countless convictions are reversed every year in every jurisdiction for error in the charge. It is not uncommon for a conviction to be reversed for the sole reason that an instruction, though not erroneous, was unclear or confusing. See Wright, Federal Practice and Procedure (Criminal) Section 485, 487 (1969). Numerous convictions have been upset for no other reason than the failure of the court to construct fully on some basic point (e.g., reasonable doubt, the presumption of innocence, or the elements of the offense). Wright, *supra*, n. Sections 485, 487. In such cases, it is no answer that the jury probably understood anyway, that the omissions were supplied in summation, that guilt was clear, or that the point was not really in issue. The *possibility* of misunderstanding is enough to vitiate the proceedings. This Court has applied the same rule where the error in the instructions is of constitutional dimension. Compare *Rogers v. Richmond*, 365 U. S. 534, 541, 544 n. 11 (1961) with *Jones v. Mississippi*, 353 U. S. 502, 520 (1947) and *Sullivan v. Louisiana*, 508 U. S. 275, 278 (1993).

A brief examination of the context in which petitioner's jury was charged compels the conclusion that some, if not all, of his jurors probably understood the charge as authorizing them to take race into account in deciding his fate. At the time of petitioner's trial, Arkansas law required the selection of jurors from electors, defined as those who had paid their county

poll tax, and the names of such persons were required to be kept in a poll tax book where they were designated by race. The jury list itself indicated race (Petition for Certiorari, p. 75a). As recently as 1968, the Arkansas miscegenation statute was being enforced, although declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). See *Higgins v. Peters*, U.S. District Court No. LR-68-c-176, E.D. Ark., September 25, 1968 (declaring the Arkansas statute invalid at the behest of a Negro man and a white woman who were denied a marriage license). During the thirty-two years immediately preceding petitioner's trial, Arkansas executed only 1 white man for rape while executing 17 Negroes (Petition for Certiorari, p. 87, n. 21). Surely, no more extensive reconstruction of the Arkansas social fabric of 1962 is needed to show that the milieu from which petitioner's jury was selected, and in which it decided that he should die, was, at the very least, tolerant of the view that rape by a Negro was a more heinous offense than the same crime by a white or that the life of a Negro defendant is less precious than that of a white. Not having been told otherwise by the court, it is altogether likely that the jury interpreted the submission of the death penalty issue, without express instruction, as authorization to take race into account. The likelihood is certainly at least as great as the possibility of jury misunderstanding underlying the decisions cited above, or the assumption that a jury which hears a prosecutor's comment on the defendant's failure to take the stand will feel authorized to take it into account (*Griffin v. California*, 380 U.S. 609 (1965)). Indeed, if as we contend an Arkansas jury would infer that race is a permissible consideration in assessing penalty from the submission as given, its understanding would have

been correct, for, in placing the issue of life or death in the unrestricted discretion of the jury, the State of Arkansas *does* authorize the jury to consider race, or any other irrelevant or impermissible factor.

Since, as we have pointed out, possible misunderstandings of basic issues, attributable either to what the jury was told or to what it was *not* told, suffice to vitiate a garden variety of conviction, how can a wholly different standard be applied when a life is to be taken? The only conceivable distinction was rejected by this Court when it noted that while deciding between life or death is

> "different, in kind from a finding that the defendant committed a specified offense . . . this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in the proscribed conduct." *Witherspoon v. Illinois*, 391 U.S. 510, 521, n. 20 (1968).

In simply submitting the issue of life or death, without comment, the trial court, in the context and under the circumstances, conveyed a gross misconception which deprived petitioner of Equal Protection of the Laws and necessarily voided his death sentence.

C

Even if it be assumed, against all the evidence, that the death penalty was not discriminatorily inflicted upon petitioner, Due Process compels the introduction of protections against the apparent risk of such discrimination.

Petitioner abundantly proved in the District Court that "Negro defendants who rape white victims have been disporportionately sentenced to death by reason of race, during the years 1945-1965 in the State of Arkansas." (Petitioner's Brief, p. 19), and the Court of Appeals seemed to agree. The statistics for the nation at large strongly imply that what is true in Arkansas is true in the entire South (Id. at 13-14). Accumulated experience and professional opinion is virtually unanimous, moreover, that throughout the nation, "the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143.

The Court of Appeals was wrong in holding that petitioner was obliged to prove that his particular jury was racially motivated, and that he failed to do so. Moreover, no such impossible burden need be met to establish, at the very least, that there was a substantial risk that a totally uninstructed jury would give vent to impermissible passions and prejudices in imposing the death penalty. It would be rank hypocrisy to deny that such a risk existed and was substantial. Nothing more is needed to make it incumbent upon a court to take measures to counteract the risk. Compare *North Carolina v. Pearce*, 395 U.S. 711 (1969), where this Court recently held that explicit findings are essential to protect a defendant against the apparent risk that his sentence might be based upon an impermissible consideration (there, penalty for a prior appeal).

At the heart of our concepts of Due Process and fair trial is the notion that the process must be so structured

as to minimize passion, prejudice or corrupt motives as ingredients of decision. Trials must not only be fair in fact, they must appear fair as well. "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). *In re Murchison*, 349 U.S. 133, 136 (1955). See also, *Estes v. Texas*, 381 U.S. 532, 542 (1965). There are myriad cases in which this Court has refused to inquire behind the *apparent* unfairness of a practice to see whether in the particular case actual prejudice was effected. See, *e.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927) where the judge's financial interest (to the tune of $12) in the outcome of a case was enough to invalidate his judgment. "Every procedure which would offer a possible temptation to the average man . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (273 U.S. at 532). A fine of $100 was involved. *A fortiori*, the substance and appearance of fairness are required where life is at stake, not merely in the determination of guilt and innocence, but in the sentencing procedure as well. Indeed, because there is so little connection between conviction and the death penalty, it is the sentencing process which particularly demands adherence to fair procedures.

There are many cases in which this Court has held that specific steps must be taken to ensure the fairness and protect the appearance of fairness of criminal trials. The idea that Due Process involves affirmative protective measures is nothing new. See *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, (1966), where the Court stated that Due Process requires trial judges to "take strong measures to ensure that the balance is never weighed against the

accused" there, by possibly prejudicial publicity; here, we would argue, by the risk of race prejudice. *Cf.* also *Spencer v. Texas*, 385 U.S. 554 (1967) (instructions that prior crimes, introduced pursuant to a recidivist statute, could not be taken into account as to guilt).

A system which authorizes predominantly white, middle class juries to mete out a death sentence to anyone they convict of a so-called "capital" offense, for any reason or for no reason, and which promises those juries that they will never be compelled to reveal or to articulate their reasons or lack of reasons, and which results in the disproportionate infliction of the death penalty on Negroes, plainly fails in its duty both to be and to appear fair. Due Process in its most elemental sense is glaringly denied.

Although about as likely as the moon's being a mirage, it is nonetheless *possible* that no jury ever voted to kill a defendant because of the color of his skin, his social status, or his economic condition. Though every known attempt of social scientists to determine the nexus between the death penalty and race in the American South has failed to exclude the link, though every known statistical study shows a connection, though virtually all students of the subject believe that there is a causal relationship, everybody *must* be wrong. Everyone may also be wrong that prejudicial publicity, as in *Sheppard*, *supra*, wreaks prejudice. The point is that so long as the data is such as to persuade virtually everyone who examines it that juries are executing people because they are Negro, Due Process demands that the sentencing process include measures to counteract the apparent risk of unconstitutional discrimination. Surely, the likelihood of sentencing based upon an impermissible consideration has

been far more clearly demonstrated in this case than it was in *Pearce*, *supra*, where this Court relied mainly upon the State's failure affirmatively to demonstrate a *proper* basis. The Due Process need for prophylactic rules requiring specific findings, as in *Pearce*, or at least instructions to the jury on permissible and impermissible consideration follows *a fortiori* in this case. The awesome factor of death adds immeasurably to the need.

The State of California contends that "If Arkansas jurors are . . . bent on racial discrimination, there is no reason whatever to believe that they will be deterred in carrying out such discrimination by any instruction or combination of instructions which a judge may read to them." (Brief of California *Amicus Curiae*, in Support of Respondent, p. 26). Yet at the very center of our jury system is the assumption that instructions are followed. *Cf. Spencer v. Texas*, *supra*, at 565 (1967). If that assumption were abandoned, the entire system of jury trials and appellate review would lie without foundation. Furthermore, even if the Court, laying aside that basic assumption underlying our jury system, were to assume that instructions to juries regarding the death penalty would be ignored, Due Process would nonetheless compel the State of Arkansas to remove its *imprimatur* from the lawless acts of its juries. Compare, *Griffin v. California*, 380 U.S. 609, 614 (1965). If Arkansas jurors were told by the court, either expressly or by fair implication from its submission of criteria, that they could not kill on account of race, the State would at least have obtained, at virtually no cost, some distance from the suspicion of discrimination. When it fails to do so, it seems to many fair minded observers to condone racially motivated executions.

The Arkansas procedure thus feeds the most corrosive suspicions one can entertain about a legal system, surely outranking, in its capacity to produce distrust and disrespect for law, the use of forced confessions or illegal searches to obtain convictions, and other practices which this Court has condemned and for which it has fashioned prophylatic rules to protect constitutional rights.

D.

The standards for imposition of the death penalty which Due Process and Equal Protection require are readily available.

We have shown three ways in which the Arkansas delegation, without standards, of the power to select a few persons for capital punishment violates fundamental constitutional norms. The basic ingredient of standards which is absent from the California procedure could easily be supplied. The Model Penal Code, for example, which establishes prerequisite findings and enumerates aggravating and mitigating circumstances (American Law Institute, Model Penal Code, Section 210.6, pp. 128-132), gives definite standards and informs the jury, by clear implication, that it may not impose the death penalty for any other reasons: not because of skin color, nor of social standing, nor of economic condition. But as in *Giaccio*, this Court is not called upon to determine what the particular criteria must be; only that there must be *some* definite criteria set by every State which chooses to authorize its juries to select those upon whom capital punishment is to be imposed.

II

THE SINGLE-VERDICT PROCEDURE COMPOUNDS THE VICES OF STANDARDLESS SENTENCING AND IMPOSES NEEDLESS AND IMPERMISSIBLE BURDENS ON THE RIGHT TO A FAIR TRIAL ON THE ISSUE OF GUILT OR INNOCENCE

As petitioner has amply shown (Petitioner's Brief, at pp. 66-78), a defendant in a capital case in Arkansas is faced with a grisly choice. He is permitted to adduce mitigating evidence on the penalty question only at the price of surrendering his right to a full and fair trial on the issue of guilt and his right not to incriminate himself. This is enough to invalidate the procedure. Yet the choices are even grislier than petitioner suggests. If an Arkansas rape defendant really fears that his life will be forfeit and is bent on saving it, he may be well advised not merely to surrender his right not to testify, and to forego the defense of consent and other trial rights, but also to yield his very right to be tried. Only by pleading guilty can he maximize his chances of saving his life.

Even leaving out of account (which the Court should by no means do) the widespread practice of guilty plea bargaining, the Arkansas defendant who pleads guilty, although not thereby absolutely immunizing himself (in absence of a plea bargain to that effect) from the death sentence, as in *United States v. Jackson*, 390 U.S. 570 (1968), will nonetheless have purchased a sentencing jury which is entirely uncontaminated by the trial of guilt.[2]

[2] If an Arkansas defendant pleads guilty to rape, empanelment of a jury to fix the sentence is mandatory. *Scarbet v. State*, 226 Ark. 503, 291 S.W. 2d 241 (1956).

one which hopefully will hear and sift his mitigating evidence with a relatively sympathetic ear. The defendant who pleads guilty will not, after all, have "compounded his offence" by denying it. His one and only appearance before the jury will be in the role of a repentent sinner. The evidence and arguments he adduces will not be contradicted, watered down, confused, or compromised by the trial of guilt. His chances of living may be enhanced manyfold. The choices open, and the pressures at work, are not, therefore, different in kind from those in *Jackson*. Here, as in *Jackson*, the procedure for assessing the death penalty needlessly burdens the exercise, not only a Fifth Amendment rights, but also of the Sixth Amendment right to a trial on the question of guilt.[1]

The Court's recent decision in *North Carolina v. Pearce*, *supra*, re-emphasized the importance of insulating the exercise of constitutional rights against pressures to forego them. In *Pearce*, the Court held that the danger to the free exercise of both constitutional and non-constitutional rights, the constitutional right to seek a fair trial and

[1] It is of no consequence that the petitioner resisted the pressures to yield his right to a trial which are inherent in the Arkansas system. The petitioner in *Griffin v. California*, 380 U.S. 609 (1965), also resisted the temptation to surrender his right not to testify, which was produced by the threat of comment thereon, yet his conviction and sentence were reversed, and the defendants, Pearce and Rice, in *North Carolina v. Pearce*, *supra*, also withstood the pressures against taking an appeal which was produced by the risk of an increased sentence at a second trial, yet their sentences were reversed. Petitioner Maxwell, like Griffin, Pearce and Rice, paid the price of resistance. In Griffin, the price was adverse comment and its potential effect on conviction; in *Pearce*, the price was the increased sentence. In Maxwell's case, the price was a sentencing jury which was potentially contaminated, inflamed, and prejudiced by the trial of guilt.

the non-constitutional right to appeal or collateral attack inherent in the possibility of a heavier sentence upon retrial must be minimized by judicial articulation of a basis for any such heavier sentence which excludes impermissible penalization. Explicit findings were held necessary to assure prospective appellants or petitioners that they run no risk of being penalized for the exercise of their rights.

The Arkansas capital defendant who resists the pressures to plead guilty faces a trial on the issues of guilt, and, if found guilty, punishment, at which he is guaranteed both constitutional and non-constitutional rights. But given the unlimited capital sentencing discretion conferred by Arkansas law, he exercises these rights at his grave peril. He may be sentenced to death for any reason the jury chooses (or for different reasons the individual jurors choose), and the reasons for his enhanced sentence remain silent, uncontrontable and unreviewable. He may be sentenced to death because he did not take the witness stand or because he did take the stand (and claimed the prosecutrix in a rape case consented), or because he raised the defense of insanity or because he failed to raise it. Indeed, every trial decision whether to exercise his substantial rights requires a "guess and a gamble," *White v. Balkcom*, 333 F. 2d 496 (5th Cir. 1964), in which the stakes are his life, for the jury may choose to kill him for pursuing his rights.

True, every trial on the issue of guilt entails risks in the choice of trial tactics, but the defendant is not placed "in the dilemma of making an untree choice." *North Carolina v. Pearce, supra*, 395 U.S. at 724 (quoting from *Worcester v. Commissioner*, 370 F. 2d 713, 718), for with re-

spect to guilt the defendant knows that the jury would be instructed what *to* consider and often what *not* to consider. See *Griffin v. California, supra*. But the Kansas single-verdict standardless capital sentencing proceeding intertwines and confuses the issues of guilt and penalty while allowing the jury free reign to condemn the defendant for any reason at all. So that not only is the capital defendant placed in a position where trial on the issue of guilt conflicts with trial on the issue of penalty, but also in deciding on how to proceed in trying these issues he is confronted with choices which entail the exercise or relinquishment of guaranteed rights while forewarned that the jury is free to make death the price.

Mr. Justice Black stated the pertinent principles in *North Carolina v. Pearce*:

> "[A] State cannot permit appeals in criminal cases and at the same time make it a crime for a convicted defendant to take or win an appeal. That would plainly deny due process of law. . . . The very enactment of two statutes side by side, one encouraging and granting appeals and another making it a crime to win an appeal, would be contrary to the very idea of government by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the conflicting laws to follow, and would thus violate one of the first principles of due process." 395 U. S., at 738–739 (Black, J., concurring and dissenting).

The State of Arkansas has afforded the capital defendant numerous rights in his defense, many guaranteed by the federal Constitution, but the State . . . has made it a crime, first punishable by death at the discretion of the jury, to exercise those rights. And, as Mr. Justice Black

has pointed out, for the State to confront a defendant with such a dilemma is "contrary to the very idea of government by law. It . . . create[s] doubt, ambiguity, and uncertainty, making it impossible to know which one of the two conflicting laws to follow". *Ibid.* And what Mr. Justice Black concluded in the context of a State's permitting appeals while at the same time taxing the exercise of the right to appeal is applicable here as well: It "violate[s] one of the first principles of due process." *Ibid.*

The similarity of this case to *Jackson*, *Griffin*, and *Pearce* makes clear that petitioner, in asking the Court to invalidate the standardless unitary trial as it exists in Arkansas, asserts no novel principles. He seeks only plainly warranted relief from a procedure which is destructive of a constellation of well established and most fundamental constitutional rights.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

Berl I. Bernhard
William T. Coleman, Jr.
Samuel Dash
John W. Douglas
Steven Duke
William T. Gossett
John Griffiths
Mrs. Rita Hauser
George N. Lindsay
Burke Marshall
Monrad S. Paulsen
Steven R. Rivkin
Whitney North Seymour
Jerome J. Shestack
Cyrus R. Vance
James Vorenberg
Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Amici Curiae have been served by mail, postage prepaid, this 24th day of October, 1969, upon counsel for the respondent, Joe Purcell, Attorney General of Arkansas, Department of Justice, Little Rock, Arkansas, 72201, and on counsel for the petitioner, Michael Meltsner, 10 Columbus Circle, New York, New York, 10019.

Berl I. Bernhard